

Reply Brief
I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being transmitted via the Office electronic filing system in accordance with § 1.6(a)(4).

Dated: October 28, 2009

Signature: Donna Dobson

(Donna Dobson)

Docket No.: 68554/P001US/10801996
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Woodrow W. Gandy et al.

Application No.: 09/927,972

Confirmation No.: 5997

Filed: August 10, 2001

Art Unit: 2159

For: METHOD FOR ENTERING, RECORDING,
DISTRIBUTING AND REPORTING DATA

Examiner: L. Black

APPELLANT'S REPLY BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Commissioner:

This Reply Brief is in response to the Examiner's Answer mailed October 13, 2009 and is in furtherance of the Notice of Appeal, dated January 22, 2009, Appellant's Brief, dated March 13, 2009, and Appellant's Reply Brief dated July 8, 2009.

An Examiner's Answer was mailed June 9, 2009, but was "vacated" and replaced by the Examiner's Answer mailed October 13, 2009. The June 9 Examiner's answer contained an inadvertent objection to claim 72, which was removed in the October 13 document. Appellant filed a Reply Brief on July 8, 2009 which addressed the objection to claim 72. Appellant presumes that the previously submitted Reply Brief is still of record despite the vacating of the original Examiner's Answer. However, in an abundance of caution, Appellant submits herewith a second Reply Brief in response to the newly submitted Examiner's Answer. The content of the Reply Brief is the same as that previously submitted except that the argument in response to the objection to claim 72 has been removed. Further, because Appellant's Request for Oral Hearing which was filed on August 6, 2009 is by definition "a separate paper" under the rules (*see* 37 C.F.R. 41.47), Appellant submits that the vacating of the Examiner's answer has no effect on the Request. As such, a valid Request

for Oral Hearing has been effectuated for the present appeal. In the event that the Request for Oral Hearing was effected by Examiner's present action, Appellant hereby renews the Request and notes that the fees for such a request have already been paid.

No fee is required for this REPLY BRIEF.

This brief contains items under the following headings pursuant to M.P.E.P. § 1208:

- I. Status of Claims
- II. Grounds for Rejection to be Reviewed on Appeal
- III. Claim Objection Arguments
- IV. Arguments
- V. Conclusion

I. STATUS OF CLAIMS

The status of the claims remains as identified in the Appeal Brief submitted March 13, 2009, which is as follows:

A. Total Number of Claims in Application

There are 32 claims pending in application.

B. Current Status of Claims

- 1. Claims pending: 56-70, 72-88
- 2. Claims canceled: 1-55, 71
- 3. Claims withdrawn from consideration but not canceled: None
- 4. Claims allowed: None
- 5. Claims rejected: 56-70, 72-88
- 6. Claims objected to: 72

C. Claims On Appeal

The claims on appeal are claims 56-70, 72-88.

II. GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL

- A. First Ground: Claims 56-77, and 86-88 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Publication No. 2002/0004729 as to Zak et al. (hereinafter “Zak”) in view of U.S. Publication No. 2002/0170565 as to Walker et al. (hereinafter “Walker”).
- B. Second Ground: Claims 78, and 80-83 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zak in view of U.S. Patent No. 6,384,815 as to Huang (hereinafter “Huang”).
- C. Third Ground: Claims 79, and 87-85 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zak in view of Huang, and further in view of Walker.

III. ARGUMENTS

Appellant notes that Examiner has substantially maintained the previous arguments in support of the grounds of rejection in Examiner's Answer. Accordingly, Appellant will refrain from repeating arguments from the Appeal Brief and will limit this reply to responding to additional aspects and/or flaws which occur in the Examiner's Answer. Furthermore, Appellant notes that in the present reply Appellant is not required to separately argue the claims, and thus, the groupings set forth in the Appeal Brief continue to be applicable. *Compare* MPEP 1205.02(vii) *with* MPEP §1208(I)(D).

In Examiner's response to Appellant's arguments for claim 56, Examiner completely shifted the reasoning underlying the present rejection. Previously, Examiner's rejection entailed combining the review of systems ("ROS") portion of the diagnosis-specific template of Walker, with the templates of Zak which are used for charting the beginning portions of emergency patient care. As pointed out in at least two previous responses and the Appeal Brief, this combination presents many logical flaws which would prevent the combination from functioning as asserted. At this late stage, Examiner appears to now assert a theory that relies on the template functionality of Zak, while utilizing Walker simply for the notion that ROS portions are known in the art (without using any functionality of Walker).

Examiner relies on paragraph 102 of Walker which states "the physician who is creating the diagnostic specific template will determine the HPI, ROS, and PFSH elements appropriate to the target diagnostic specific template." This teaching discusses taking ROS elements relevant to a diagnosis, and placing them in a diagnosis specific template, whereas claim 56 recites "*certain of said presentations having at least an HPI portion, and an ROS portion for a particular medical complaint.*" As discussed at length in previous responses and the Appeal Brief, the complaint stage and the diagnosis stage are on completely different ends of the timeline for patient care. As such, relevant information at these two stages significantly diverge. For example, at the beginning of patient care a patient comes in with a medical complaint (*e.g.* the patient states he has a stomach ache). At that point, the physician gathers information, conducts tests, etc. Having all of the relevant information, the physician can then make a diagnosis (*e.g.* food poisoning, flu, appendicitis, ulcers, strained/pulled muscles, etc.). The information relevant to a complaint versus information relevant to a diagnosis have the potential to be significantly divergent due at least in part to the fact that in

many cases there are numerous possible diagnoses for a single complaint. In fact, if a physician only had information relevant to a single diagnosis (e.g. of a patient having ulcers), this information would most likely be of little help to the physician at the initial complaint stage owing to the fact that many other possible diagnoses are possible. Taken further, if a physician had all information relevant to all possible diagnoses, the physician would likely have too much information, such that efficient use of the information would be impossible.

Therefore, it is clear that a discussion of ROS elements relevant to a diagnosis template is not the same as teaching ROS portions for a particular medical complaint. Moreover, a mere showing by Examiner that ROS elements are known is not tantamount to showing that a particular type or grouping of ROS portions (*i.e.* for a particular medical complaint) are known and displayed in a screen presentation form as required by the present claim.

Further, Examiner asserts that Zak discloses a history of present problem template which is correlated to a stated patient problem. However, even if this were true (that a problem form is associated or contains portions associated with a stated problem), it does not follow that one with skill in the art would find it obvious to create an ROS portion of a screen presentation based off of the stated problem. This is true even if one were to assume that ROS elements on diagnosis templates are known. As such, Examiner's previous and new reasoning for rejecting claim 56 is flawed and should be overturned.

Moreover, claim 56 recites "*a database having pre-programmed screen presentations, each presentation containing information pertinent to a particular medical complaint.*" The present rejection and Examiner's Answer have only asserted that the "history of problem" form of Zak contains information pertinent to a particular medical complaint, there is no teaching in Zak that other forms, *i.e.* exam, vital form, etc. contain *information pertinent to a particular medical complaint*. Therefore, Zak does not teach "*each presentation containing information pertinent to a particular medical complaint,*" as specifically recited in claim 56.

In reference to claim 70, Appellant argues that the claim requires "*capturing medical history information pertaining to said patient on a first screen presentation of said selected template*" and "*capturing physical exam information pertaining to said patient on a second*

screen of said selected template, said second screen presentation being one of said plurality of template presentations having pre-identified selectable data elements pertaining to said chief medical complaint.” In other words, in the claimed invention, the screen in which exam information is captured has selectable information pertaining to the chief medical complaint. Examiner asserts that Zak selects a problem, and then a history of problem form is used that has information relevant to the selected problem. However, even if this is true, Examiner has cited no teaching showing a second screen presentation for capturing exam information which includes pre-identified selectable data elements pertaining to a chief medical complaint. In fact, Appellant indicated in the Appeal Brief that the presence of an “exam form” is shown in the Zak reference, however, there is no teaching in Zak that the exam form has pre-identified selectable data elements pertaining to said chief medical complaint. As pointed out in Examiner’s Answer, Zak teaches that information regarding the patient is gathered on respective forms, including the exam form. However, Examiner’s showing (*i.e.* that an exam form is used to collect information) is insufficient to assert that the exam form has pre-identified selectable data elements pertaining to said chief medical complaint as required by claim 70. Therefore, the rejection should be overturned.

In reference to claim 86, Examiner’s Answer misconstrues the teachings of Walker. Appellant described in the Appeal Brief that Walker uses pre-generated reports that stem from the diagnostic-specific templates that are pre-generated by a programmer and are subsequently filled in by a physician. The claimed invention requires “said system programmed to generate a textual prose representation correlating information corresponding to selections of said pre-identified data elements.” As such, the claim requires that the system is programmed to correlate information from data element selections and generate the textual prose representation corresponding to the selections. Examiner cites paragraph 95 of Walker which states that a physician completes the electronic medical record and a report may then be printed after the session is over. This portion shows that it is the physician that is actually creating the report, and not the system of Walker. Therefore, the rejection should be overturned.

During the discussion of claim 60 in the Examiner’s Answer, Examiner ignores the explicit claim term “*pre-identified*” when addressing the claim despite the fact that Appellant’s primary argument for this claim is that Zak fails to disclose a pre-identified graphic of an anatomical area which is pertinent to said chief medical complaint. Appellant

will refrain from repeating these arguments and respectfully references the Board to the Appeal Brief at page 10. Examiner's non-answer is further proof that the rejection of claim 60 should be overturned.

With respect to claims 61, 63 and 67-69, Examiner offers no new argument. Appellant therefore rest on the argument of the Appeal Brief. See Appeal Brief at 10-11.

In reference to claims 78 and 80-83, Examiner maintains a particularly strained line of reasoning for rejection. Appellant maintains all arguments set forth in the Appeal Brief (*see* pgs 12-13. Appellant notes that a major disadvantage in prior art medical charting applications is that they require the use of radio buttons for making selections and/or answering questions. *See* Figure 1 of the present Application; and Figure 6 of Zak. The present rejection is flawed on many levels and clearly fails to assert a combination which remedies these disadvantages as is done by the claimed invention.

Appellant notes that one with ordinary skill in the art simply would not look at the text annotation tool of Huang, which merely allows for hand-drawing on a screen, when designing a medical charting application which requires data elements to have the ability to be selected or rejected. Further, even if one of skill in the art did look at Huang, they would not conclude that the reference is capable of functioning as Examiner has asserted. The drawings/markings that are placed on or around the text of Huang are simply that, user drawings. They do not function to make selections of data. Further, if such encircling was placed around data labels of Zak, it would not function to make data selections because the radio buttons of Zak are required to make such selections. As a result, the present combination would not be made, and is only being made at this point in time using impermissible hindsight reconstruction.

Appellant notes that the features of claims 78 and 80-83 are not trivial. The disposal of radio buttons on charting forms provides for efficiency and user friendliness heretofore unattainable. It further provides a solution to a problem that the industry did not necessarily recognize as a problem as evidenced by the continued use of techniques requiring such radio buttons/checkboxes, etc. Therefore, the rejection of claims 78 and 80-83 should be overturned.

IV. CONCLUSION

In view of the above, Appellant respectfully submits that the rejections in the present case are improper, and respectfully requests reversal of said rejections.

Appellant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 06-2380, under Order No. 68554/P001US/10801996 from which the undersigned is authorized to draw.

Dated: October 28, 2009

Respectfully submitted,

By 

David H. Tannenbaum

Registration No.: 24,745

FULBRIGHT & JAWORSKI L.L.P.

2200 Ross Avenue, Suite 2800

Dallas, Texas 75201-2784

(214) 855-8333

(214) 855-8200 (Fax)

Attorney for Applicant